

REMARKS

In the Official Action mailed 14 February 2006, the Examiner reviewed claims 25-46. The Examiner has objected to claim 25 (mistakenly identified as claim 26) because of informalities; and has rejected claims 25-46 under 35 U.S.C. §103(a).

Applicants have amended claim 25.

Objection to Claim 25 for Informalities

The Examiner has objected to claim 25 (mistakenly identified as claim 26) and asked that a different term be substituted consistently for “named displays”. The substituted terms are “named display fixture types” and “named display fixtures”, depending on the context.

Accordingly, reconsideration of the objection to claim 25 as amended is respectfully requested.

Rejection of Claims 25-46 under 35 U.S.C. §103(a)

The Examiner has rejected claims 25-46 under 35 U.S.C. §103(a) as being unpatentable over Landvater (U.S. 6,609,101) in view of a furniture advertisement, Display Unlimited (www.displayunlimited.com).

Claim 25

The art cited to counter amendment of claim 25 is a furniture advertisement. This is a first, in our experience, for an advertisement for hard goods to be cited against a software case. (Consulting/design services for those buying display fixtures are ancillary to selling. *See, e.g.*, www.BeffelLighting.com.) Citation of a furniture advertisement as the most relevant prior art after at least three searches means that the case should be in condition for allowance.

The last amendment followed the Examiner’s suggestion and clarified that naming a plurality of display fixture types relates to an intermediate abstraction that supports the variety of physical fixture types (Appl. 8-9) used in a retail display. The Examiner acknowledged during our interview and again in the office action (OA 4) that Landvater does not suggest any such intermediate abstraction.

In this OA at page 4, the Examiner somewhat overstates Landvater’s disclosure. Along the lines of the Examiner’s phrase “a number of shelf configurations”, Landvater teaches counting the number of shelves, the number of facings on a shelf and the number of rows behind a facing. Col. 14, lines 38-51. To us, that is one configuration: a shelf that comes in different

sizes, as opposed to a variety of display fixture types, such as those listed in this application. Certainly, Landvater does not suggest any intermediate abstraction of a named display fixture type. Along the lines of “floor displays”, Landvater refers to a bed that can be displayed on the floor without any display fixture (col. 14, lines 51- 55), which still leaves Landvater with only one configuration of display fixture: a shelf that comes in various sizes. (“Floor displays” – think Bloomingdale’s – has a different meaning in retailing than “floor models” – think Ford dealer – which is the more accurate term that the Examiner used further along on page 4.) Someone reading the Examiner’s words might get the wrong impression and think that Landvater had something to do with the variety of display fixture types that are used in retailing.

The second reference, the furniture sales site “Display Unlimited”, has nothing to do with software design. One of ordinary skill in the art would be more likely to use Display Limited to furnish their office for walk-in software sales than to view it as an inspiration for software design. The furniture advertisement is far off point.

On pages 4-5 of the Office Action, the Examiner waves a hand at combining Landvater, well known retailing practices and the furniture advertisement to produce a different software design than Landvater discloses. The Examiner offers an obviousness argument of the form, <one can walk into a store and see things there>, therefore, it would be obvious to <design software to represent what one can see>. That form of argument does not satisfy the case law, the MPEP or common sense.

The standard set by *In re Lee*, 277 F.3d 1338, 1342-44, 61 USPQ2d 1430, 1433-34 (Fed. Cir. 2002) requires more. The Federal Circuit clarified the need for evidentiary quality support of an examiner's factual basis for finding a teaching, suggestion or motivation in the prior art (as opposed to an examiner's opinion), 277 F.3d at 1343-44:

As applied to the determination of patentability vel non when the issue is obviousness, "it is fundamental that rejections under 35 U.S.C. § 103 must be based on evidence comprehended by the language of that section." *In re Grasselli*, 713 F.2d 731, 739, 218 U.S.P.Q. (BNA) 769, 775 (Fed. Cir. 1983). ... "The factual inquiry whether to combine references must be thorough and searching." *Id.* It must be based on objective evidence of record. This precedent has been reinforced in myriad decisions, and cannot be dispensed with. [citation omitted] The need for specificity pervades this authority. See, e.g., *In re Kotzab*, 217 F.3d 1365, 1371, 55 U.S.P.Q.2D (BNA) 1313, 1317 (Fed. Cir. 2000) ("**particular findings must be made as to the reason the skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed**"); *In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2D (BNA) 1453, 1459 (Fed. Cir. 1998) ("even

when the level of skill in the art is high, the Board must identify specifically the principle, known to one of ordinary skill, that suggests the claimed combination. In other words, the Board **must explain the reasons one of ordinary skill in the art would have been motivated to select the references and to combine them** to render the claimed invention obvious."); *In re Fritch*, 972 F.2d 1260, 1265, 23U.S.P.Q.2D (BNA) 1780, 1783 (Fed. Cir. 1992) (the examiner can satisfy the burden of showing obviousness of the combination "only by showing **some objective teaching** in the prior art or that knowledge generally available to one of ordinary skill in the art **would lead that individual to combine the relevant teachings of the references**"). ... In its decision on Lee's patent application, the Board rejected the need for "any specific hint or suggestion in a particular reference" to support the combination of the Nortrup and Thunderchopper references. Omission of a relevant factor required by precedent is both legal error and arbitrary agency action.

(Emphasis added.) The Examiner's reasoning does not acknowledge or satisfy this standard.

Following *In re Lee* and *In re Kotzab*, the Examiner is required to cite a statement of motivation for the skilled artisan, with no knowledge of the claimed invention, to have selected components from Landvater and the furniture catalog and to combine them in the manner claimed. The Examiner's whole reasoning (OA 5) rests on Landvater col. 14, lines 25-35 and 55-65, which read:

Another feature of replenishment system 200 is the calculation of time-phased safety stock levels based on the current and future arrangement of products on the shelves of retail stores 23. As explained above, planned replenishment orders which are calculated without accounting for the future changes in shelf configuration will be inaccurate. Consequently, they have limited use in planning for products at suppliers 24 (the second level in the supply chain, a retail distribution center for example), and planning projected inventory levels at retail stores 23 and suppliers 24.

If a mattress were not stocked in the back, and someone were to buy the mattress on display, there would be nothing to display until the next shipment from the suppliers or supplier. FIG. 14 illustrates the logic in replenishment system 200 for converting shelf configuration into safety stock level. Initially, at step 250, the current shelf configuration is converted into a safety stock level by multiplying the facings by the minimum rows deep needed for an attractive display. Next, at step 252, a determination is made if shelf changes are needed. If there are any future shelf changes, the logic proceeds to step 254 where shelf change arrays are loaded.

These passages do not teach, suggest or motivate combining Landvater and the furniture catalog to produce an intermediate abstraction of named display fixture types. The passages allows for either assigning presentation quantities by location, regardless of fixtures and fixture setups

(Applic. pp. 10-11) or counting shelf facings as one would do at a grocery store (Landvater, col. 14). Both of these approaches meet Landvater's accuracy motivation.

The only source in this case for teaching how to combine the references is the text of claim 25, itself. Therefore, the Examiner's motivation argument relies on hindsight, which is difficult to avoid when the references do not teach or suggest the claimed combination. 2-5 Chisum on Patents § 5.03 [2][c] n. 29 (2005 Lexis version); e.g. *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546, 48 USPQ2d 1321, 1329 (Fed. Cir. 1998) ("Determination of obviousness can not be based on the hindsight combination of components selectively culled from the prior art to fit the parameters of the patented invention."); *Grain Processing Corp. v. American Maize-Products Corp.*, 840 F.2d 902, 907, 5 USPQ2d 1788, 1792 (Fed. Cir. 1988) ("Care must be taken to avoid hindsight reconstruction by using 'the patent in suit as a guide through the maze of prior art references, combining the right references in the right way so as to achieve the result of the claims in suit.'").

The claimed features are admittedly novel and plainly non-obvious over the art of record. Therefore, following at least three searches in this case and additional (presumably) searches in closely related cases, claim 25 should be allowable because it readily distinguishes over the prior art.

Claims 26, 29-30, 32 and 34

Here, we begin grouping claims. Grouping is appropriate, because the same citations have been repeatedly cut-and-pasted from one section of the office action to another. For instance, the 21 lines of text at column 8, lines 25-45 have been referred to in 19 separate rejections of claims 27-29 and 31-46. In general, after claim 25, the form of rejection is <claim #> <recitation of claim limitation><cut-and-pasted citation to multiple passages of Landvater> followed by a few words that say what the Examiner finds in one or more of the cut-and-pasted passages. We focus on the words that say what the Examiner finds.

Claim 26 includes the limitation:

wherein a user interface facilitates associating predetermined sets of respective time elements with the good at the plurality of selling locations

"*Predetermined sets of respective time elements*", both in this claim and as refined in claim 29 are missing from Landvater. In claims 29-30, 32 and 34 the time elements are refined to specify data collection, recommendation reviews, data processing, goods picking and shipping and other elements. The application, pages 4-5 and 7-8, consistent with the claims, describes time

elements as separate times associated with parts of the supply cycle that are combined to model the cycle for a particular good at a particular store.

Landvater does not include a method of combining time elements to build up a supply cycle. In a few places, Landvater refers to a “lead time (or transit time)” (e.g., 8:34, 9:20). More often, Landvater advocates a “safety time” (cols. 18-20). Neither of Landvater’s time parameters anticipates claims 26 or 29-30. The cited passages do not anticipate the claims either.

Combining reusable time elements is not the same as having the user specify a total overall time from order to delivery at a particular location.

Therefore, following multiple searches, claims 26, 29-30, 32 and 34 should be allowable because they readily distinguish over the prior art.

Claims 27, 31, 33 and 35-36

Claims 27, 31, 33 and 35-36 should be allowable over Landvater for at least the same reasons as the claims from which they depend.

Claim 37

Claim 37 includes the limitation:

wherein the action includes allocating delivery of the good after ordering from a supplier

This detail of retail merchandising is not addressed by Landvater in any of the passages cited: 6:45-67; 8:25-45; 9:1-25 & 55-67; 13:30-45 & 59-67; or 14:25-65.

This application refers frequently to post-order placement allocation (“post allocation”) of goods from a supplier. For instance, post allocation is defined on page 4 and further applied on page 6. Formulas that may be applied to allocation are presented and explained on pp. 19-20. None of the Landvater passages cited recognize or apply the concept of post allocation of goods already ordered. Teaching away from post allocation, Landvater takes a rigidly supply chain view of ordering and delivering exactly the projected need. For instance, at 9:3-5, “The sum of the projected replenishment shipments to retail stores 23 is used as input to replenishment system 200 at suppliers 24. The sum of the projected replenishment shipments to retail stores 23 represents what will be shipped out of suppliers 24.” Instead of anticipating this claim, Landvater teaches away from the claim.

Therefore, claim 37 should be allowable.

Claims 38-40

Claims 38-40 should be allowable over Landvater for at least the same reasons as claim 25 from which they depend.

Claims 41-45

Claims 41-42 and 44-46 the limitations:

41. The method of claim 25, wherein the presentation quantity used in the roll up is the average presentation quantity for the location during the predetermined selling period.

42. The method of claim 25, wherein the presentation quantity used in the roll up is the presentation quantity for the selling location on the first day of the predetermined selling period.

43. The method of claim 25, wherein the presentation quantity used in the roll up is the presentation quantity on the day of the predetermined selling period when the good is received at the selling location.

44. The method of claim 25, wherein the presentation quantity used in the roll up is the largest presentation quantity associated with the good at the selling location for any day of the predetermined selling period.

45. The method of claim 25, wherein the rolling up includes selecting the larger of the presentation quantities or the projected demand requirements for the good at the selling locations.

46. The method of claim 25, wherein the presentation quantity used in the roll up is the presentation quantity for the selling location on the last day of the predetermined selling period.

For reference, we also have included the limitations of claim 43, which may reflect the way that Landvater handles presentation quantities. The Examiner has cited the same passages, 8:25-45; 9:1-25 & 55-67; 10:1-20; 14:25-65; 15:1-6 & 17-25, as teaching all six different treatments of presentation quantity, without distinguishing among them. (The Examiner's words, other than reciting the claims, are verbatim from one rejection to the next.)

Landvater teaches one treatment of presentation quantities, not six alternatives.

Landvater Figures 14-15 illustrate the logic in replenishment system 200 for converting shelf configuration into safety stock level and for updating safety stock requirements. *See, 14:59-15:25.* Only one logic is suggested, without any alternatives. When the Examiner decides which of the six logics that Landvater uses, the other five should be patentable.

Therefore, claims 41-42 and 44-46 and perhaps claim 43 should be allowable over Landvater.

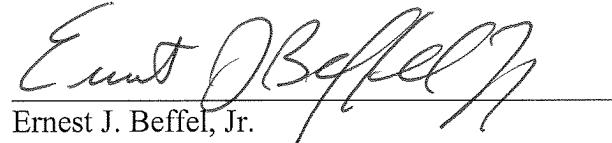
CONCLUSION

Applicants respectfully submit that the pending claims are in condition for allowance and solicit acceptance of the claims.

The undersigned can ordinarily be reached at his office at (650) 712-0340 from 8:30 a.m. to 5:30 p.m. PST, Monday through Friday, and can be reached at his cell phone at (415) 902-6112 most other times.

The Commissioner is hereby authorized to charge any additional fee determined to be due in connection with this communication, or credit any overpayment, to our Deposit Account No. 50-0869 (BLFR 1001-1).

Respectfully submitted,



Ernest J. Beffel, Jr.
Registration No. 43,489

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HAYNES BEFFEL & WOLFELD LLP
P.O. Box 366
Half Moon Bay, CA 94019
Telephone: (650) 712-0340
Facsimile: (650) 712-0263